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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 196

TOWAR COTTON MILLS, INC., APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 30) is reported in 59 Ct. Cls. 841.

JURISDICTION

The judgment to be reviewed was entered on June 9, 1924. (R. 35.) On July 18, 1924, a motion for new trial was seasonably made and entertained. On October 20, 1924, it was overruled. (R. 35.) An appeal was taken the same day (R. 35, 36), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, chap. 229, 43 Stat. 936, 941).

THE QUESTION

The appellant made a contract with the United States to furnish certain grey duck. By a supplemental contract, the Government advanced the sum of $32,100. The original contract contained a cancellation clause and after the Armistice the contract was canceled in accordance with such clause. The appellant presented a claim to the War Department because of such cancellation and an award was made upon such claim. The claim so presented by appellant includes all of the items that are now the subject of this suit. Some of such items were allowed in whole or in part and others were disallowed and the War Department made an award upon the claim as a whole, which award was accepted by appellant herein and the amount thereof applied upon the unpaid balance due the United States on account of the advance so made to appellant by the United States. The appellant, nearly three years after the acceptance of the award, brought this suit to recover the difference between the amount of its claim presented to the War Department and the amount of the award made by the War Department and accepted by appellant. The Government filed a counterclaim for the unpaid balance upon the advancement made by the Government to appellant after the application of the amount of the award. The Court of Claims found that appellant was not entitled to recover but that the Government should recover

the amount of $10,892.75, the unpaid balance on the advancement, together with the cost of printing the record. The questions, therefore, are whether the appellant can maintain an action to recover the difference between the amount which it claimed before the War Department and the amount which the War Department awarded and appellant accepted upon such claim, and whether judgment in favor of the United States was proper.

STATEMENT

The facts as found by the Court of Claims are as follows:

On June 24, 1918, the appellant, a Maine corporation, entered into a contract with the United States to furnish the Government 100,904 yards of grey duck at the contract price of $107,438.40. (R. 30.) The contract is Exhibit "A" to the petition and made a part of the findings by reference. (R. 30.) Article 14 of such contract provided in substance that as the contract was necessitated by a state of war and it was desirable that provision be made for its cancellation in the event of the termination or limitation of the war, "It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the Contractor that any part of the articles then remaining undelivered shall not be manufactured or delivered." Said Article

14 of the contract then provided for a certain plan of settlement in the event of cancellation. (R. 7.)

On July 6, 1918, appellant entered into a supplemental contract with the United States, under which the United States advanced and paid to appellant the sum of $32,100.00. (R. 30.) By this contract it was provided that the money advanced was to be used in payment for machinery, equipment, and raw materials required in the performance of the principal agreement (R. 11), and that a certain percentage should be deducted from the vouchers thereafter to be paid to appellant until the full amount of the advancement had been paid back to the Government. (R. 11.) The payments as made were to be applied to the principal and thereafter to the interest accrued on the outstanding balances. (R. 11.) As security for the payment of said advancement, the appellant gave a demand note to the Government in the sum of $32,100.00, dated July 6, 1918, with interest at the rate of 6 per cent per annum from date until paid. (R. 30.)

The appellant began performance of this contract and complied with the terms thereof until November 15, 1918, when the United States cancelled the contract as provided in Article 14 thereof. At such time 19.02 per cent of said contract had been performed by appellant and 80.98 per cent was unperformed. The contract work which

was performed was paid for by the United States. (R. 31.) Appellant presented a claim for $36,-332.65 to the Purchase Claims Board and on appeal the claim was sent to the Board of Contract Adjustment where, on April 28, 1920, a decision was rendered by such board and in June, 1920, an award made by the War Department to appellant in the sum of $14,054.79 (R. 31), " which award was accepted by this plaintiff (appellant) on June 3, 1920." (R. 31.) A copy of the award is set out in the findings. (R. 31 to 33.) The award clearly identifies the original contract above referred to (R. 31), and among other things provides as follows (R. 33):

> The Secretary of War hereby awards to said claimant the sum of $14,054.79 (block 3), which sum, in conjunction with the payments herein above mentioned made or to be made for the articles, work or services heretofore delivered and accepted shall be in full adjustment, payment and discharge of said agreement.

At the end of such award the following appears (R. 33):

> Accepted June 3rd, 1920. Towar Cotton Mills, Inc. (Sgd.), Claimant, by Henry M. Towar (Sgd.), Treas.

" All of the items set up by plaintiff in this suit were embodied in the claim on which the aforesaid award was made." (R. 34.) Recoupment pay-

ments were made upon the $32,100 advanced on July 6, 1918, as follows:

October 31, 1918	$1,403.50
November 8, 1918	1,409.41
November 15, 1918	1,427.91
November 19, 1918	1,244.78
November 25, 1918	1,160.26
December 5, 1918	515.60
Aggregating	7,152.46

all of which was credited on the principal sum. The United States also credited the sum of $14,054.79, the amount of the aforesaid award, making a total credit of $21,207.25, which left due on the loan the sum of $10,892.75, as of June 3, 1920, the date the appellant accepted the award. (R. 34.)

Based upon these findings, the Court of Claims rendered judgment for the United States in the sum of $10,892.75 with interest thereon at the rate of 6 per cent per annum from June 3, 1920, until paid, together with the costs of printing the record. (R. 35.)

ARGUMENT

SUMMARY

I. The appellant accepted the award made by the United States in full adjustment, payment and discharge of the claims made in this suit and can not now maintain this suit for any claim on account of the cancellation of said agreement.

II. If this is a claim under the Dent Act, the Court of Claims had no jurisdiction thereof, since

the Secretary of War had made an award which was accepted by appellant.

III. The appellant failed to prove its case.

IV. The Court of Claims properly awarded the Government judgment for the balance due by the appellant upon the advances made by the United States to the appellant.

I

THE APPELLANT ACCEPTED THE AWARD MADE BY THE UNITED STATES IN FULL ADJUSTMENT, PAYMENT AND DISCHARGE OF THE CLAIMS MADE IN THIS SUIT AND CANNOT NOW MAINTAIN THIS SUIT FOR ANY CLAIM ON ACCOUNT OF THE CANCELLATION OF SAID AGREEMENT.

The contract by its terms provided for cancellation thereof in the event of the termination or limitation of the War. (R. 7.) Following the cancellation thereof, after the Armistice (R. 31), the appellant made a claim because of such cancellation before the War Department, which was there considered and upon which an award was made and accepted by appellant. (R. 31.) The award clearly identified the original contract and referred to the cancellation thereof. (R. 31.) It then shows the amount awarded to appellant to be the sum of $14,054.79 (R. 32), and provides (R. 33):

> The Secretary of War hereby awards to said claimant the sum of $14,054.79 (block 3), which sum, in conjunction with the payments herein above mentioned made or to be

> made for the articles, work or services heretofore delivered and accepted shall be in full adjustment, payment, and discharge of said agreement.

It is also clearly shown by the findings that appellant accepted the award. Upon this the findings are as follows: " which award was accepted by plaintiff on June 3, 1920." (R. 31.)

At the end of such award there appears the following (R. 33):

> Accepted June 3rd, 1920, Towar Cotton Mills, Inc. (Sgd.), Claimant, by Henry M. Towar (Sgd.), Treas.

The court below has further found, which will also be apparent from an examination of the award, that all of the items set up by appellant in this suit were embodied in the claim on which the aforesaid award was made. (R. 34.)

The appellant, almost three years later (R. 1, 33), brought this suit in an effort to recover the difference between what it originally claimed before the War Department and the amount of the award so made by the War Department and accepted by appellant.

The appellant in its brief suggests that this award was attempted to be made by the War Department under the provisions of the Dent Act which are hereinafter set out and discussed and that such act did not authorize the Secretary of

War to make an award in a case of this kind where there was a formal contract. We deem it unnecessary to discuss or ask this Court to decide whether the award was within the power given to the Secretary of War under the Dent Act or whether the Secretary of War attempted to act under such law, since we contend that a decision of such questions will not affect this case. When appellant submits its claim and contentions to the Secretary of War and they are there duly considered and a determination thereof is accepted by appellant and the benefits thereof received by it, the appellant is thereby precluded from making any further claim with reference to the matters so settled. This was decided by this Court long ago in the case of *United States* v. *Adams,* 7 Wall. 463 (see p. 478 and following), and has been followed many times since that decision. See *Savage, Executrix* v. *United States,* 92 U. S. 382, 388; *United States* v. *Child & Co.,* 12 Wall. 232, 243; *United States* v. *Justice,* 14 Wall. 535; *Mason* v. *United States,* 17 Wall. 67; *United States* v. *Mowry,* 154 U. S. 564.

Appellant in its brief contends that the courts will not permit a settlement of this kind as the same is without consideration. However, the cases above cited clearly establish the proposition that where as in this case the amount is disputed and a settlement is made, the same will be sustained by the courts and there is ample consideration for such settlement.

II

IF THIS IS A CLAIM UNDER THE DENT ACT, THE COURT OF CLAIMS HAD NO JURISDICTION THEREOF, SINCE THE SECRETARY OF WAR HAD MADE AN AWARD WHICH WAS ACCEPTED BY APPELLANT

Assuming that this claim is one arising under the Dent Act, and that the Secretary of War attempted to act thereunder (which we contend is entirely immaterial), then there was no jurisdiction in the Court of Claims to entertain this suit. The award recites that the contract had not been executed in the manner prescribed by law. (R. 31.) The pertinent provisions of the Dent Act, c. 94 (40 Stat. 1272), are as follows:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been per-

formed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law.

* * * * *

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said section.

The statute, after empowering the Secretary of War to make adjustment, payment and discharge of agreements express or implied, of which the Court of Claims but for such act would not have jurisdiction, expressly provides that (1) if the claimant is not willing to accept the adjustment, payment or compensation offered by the Secretary of War, or (2) if the Secretary of War fails or refuses to offer a satisfactory adjustment, then the Court of Claims shall have jurisdiction of such claim. The Government, therefore, contends that,

in order for the Court of Claims to have jurisdiction of a claim under the Dent Act, the claimant must either refuse to accept the award or the Secretary of War must fail or refuse to make an award. Neither of these things happened here; the Secretary of War did make an award and it was accepted by appellant. Therefore, the Court of Claims has no jurisdiction under the Dent Act.

III

THE APPELLANT FAILED TO PROVE ITS CASE

Assuming, without conceding, that appellant is right in its legal contentions to the effect that it is not foreclosed by the settlement which has been made, and which it has accepted, still appellant cannot succeed on this appeal for the reason that it has failed to prove its case. An examination of the findings of fact will show that there is not a single finding to establish any loss or damage suffered or sustained by appellant because of the cancellation of this contract. The findings in substance show the making of the contract, the cancellation thereof, the submission of a claim based thereon, but without any proof as to the items thereof, the making of an award upon such claim and the facts concerning the amount due by appellant to the Government because of the advancement. In all of this, there is not one word to show that appellant suffered any loss, the amount thereof, or that he is entitled to recover because of such

loss. The Court of Claims in its memorandum opinion says: "In this case the plaintiff has not proved the items of its claim." (R. 34.) It would seem that further discussion of this question is unnecessary.

IV

THE COURT OF CLAIMS PROPERLY AWARDED THE GOVERNMENT JUDGMENT FOR THE BALANCE DUE FROM THE APPELLANT UPON THE ADVANCES MADE BY THE UNITED STATES TO THE APPELLANT

The Government advanced to appellant under the supplemental contract dated July 6, 1918, the sum of $32,100. (R. 30.) The Government had been paid by deductions from vouchers of appellant the sum of $7,152.46, and by application of the amount of the award, $14,054.79, making a total payment by appellant of $21,207.25, thus reducing the indebtedness of appellant to the Government to the sum of $10,892.75, as of the date of June 3, 1920, upon which date appellant accepted the award. (R. 34.) For this sum the court rendered judgment in favor of the United States. (R. 35.) The appellant in its brief apparently now questions the propriety of this judgment. It is felt that it is only fair to say that this is the first time that appellant has questioned the existence of this indebtedness in favor of the Government. In the bill of complaint, or petition filed by the appellant, in referring to the application of the amount of the award to the advanced pay-

ment made by the Government, appellant does not seem to question the propriety or existence of the claim by the Government against appellant. (R. 2.) The Government interposed a counterclaim setting up this indebtedness (R. 26), and to such counterclaim appellant filed an answer (R. 29), in which it says: "The United States is not entitled to recover anything from it on its counterclaim or set-off as the said defendant is indebted to the plaintiff in a greater sum than the amount claimed in said set-off" (R. 29).

It would seem that the findings of fact showing the existence of the advance payment by the United States to appellant, and that there was a balance due to the United States from appellant upon such advancement (R. 34), are sufficient to sustain the judgment which the Court of Claims rendered in favor of the United States. Plaintiff now contends, however, that the award, a copy of which is set out in the findings (R. 31–32), shows that there were no claims by the Government to be deducted. It is assumed that appellant refers to Item 13 of the "Brief of Settlement" (R. 32), which reads as follows:

> Claims of Government to be deducted $——.

It is quite clear from the record in this case that the award was intended by both parties and did in fact refer to and settle only the original contract dated June 24, 1918, and had no effect whatever

upon the supplemental contract dated July 6, 1918, or the advance payment made thereunder.

The award expressly states that it was dealing with "an agreement * * * entered into * * * on or about the 24th day of June, 1918" (R. 31), which was the original contract (R. 2 and 30). The award also identifies the contract which was covered by said award as "3. Original contract number 5645 EQ. Dated June 24, 1918." (R. 32.) This was the number and date of the original contract. (R. 2.) The award was in full adjustment, payment, and discharge of "said agreement." (R. 33.) No agreement other than the original agreement dated June 24, 1918, is referred to or mentioned at any place in said award. The supplemental agreement under which the advance payment was made and the balance was due was dated July 6, 1918 (R. 13 and 30), and such agreement is not referred to or mentioned in the award. Therefore, we contend that the clause referred to by appellant, which left blank any amount to be deducted, had reference only to claims by the Government against appellant growing out of the original contract, and had no effect whatever upon the supplemental contract or the money due to the Government thereunder. There was no attempt to cancel or end the supplemental contract.

The subsequent acts of appellant and the United States prove the correctness of the Government's

contention, and are such as to estop appellant from a contrary contention.

The appellant in its bill of complaint herein admits that it signed the voucher covering the amount of the award with the information that the Government was going to apply the same upon the balance due by appellant to the United States because of such advance payments. (R. 2.) The answer of appellant to the counterclaim herein, as above shown, claims that the Government is not entitled to recover on its counterclaim, not because the sum was settled in the award, but because there is an excess amount which appellant claimed was due to it. (R. 29.) In addition to these facts, so far as this record shows, the appellant permitted the application of the full amount of the award upon the balance due by it to the United States because of such advance payments and never complained until almost three years later when it filed this suit and then it did not complain because of the application of the award as aforesaid and, as before stated, has offered no complaint until the brief filed by appellant in this Court.

We respectfully submit that, in the first place, there is nothing in the award to justify the contention that it was intended to or did, in fact, make an award of approximately $14,000 over and above the amounts due by appellant to the Government because of these advance payments, and that even if appellant did understand such to be the nature

of the award, that it cannot now be heard to complain, having by its actions heretofore taken another position, and having so long delayed presentation of its present contention.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General of the United States.
HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1926.

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